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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1979

**No. 79-664**

VENTURA COUNTY,
*Appellant,*
v.
THE GULF OIL CORPORATION,
*Appellee.*

**BRIEF AMICUS CURIAE OF THE WESTERN GOVERNORS' POLICY OFFICE (WESTPO) IN SUPPORT OF THE JURISDICTIONAL STATEMENT**

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TABLE OF CONTENTS


| | Page |
|---|---|
| Statement of Interest of Amicus | 1 |
| Argument: | |
| I | 2 |
| II | 3 |
| III | 4 |
| Conclusion | 13 |


## CONSENT OF PARTIES

Consents of both parties (Appellant and Appellee) to the filing of this Amicus Brief have been obtained. Letters from counsel for both parties indicating this consent have been filed with the Clerk of the Supreme Court.

TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Barden v. Northern Pacific Railroad Co., 154 U.S. 288 (1894) | 12 |
| Colorado v. Toll, 268 U.S. 228 (1925) | 7, 11 |
| Edelman v. Jordan, 415 U.S. 651 (1974) | 13 |
| Katzenbach v. Morgan, 384 U.S. 641 (1966) | 12 |
| Kleppe v. New Mexico, 426 U.S. 529 (1976) | 5, 8, 9, 11, 12 |
| Maryland v. Wirtz, 392 U.S. 183 (1968) | 12 |
| Mayor of New Orleans v. United States, 35 U.S. (10) Pet.) 662 (1836) | 6 |
| National League of Cities v. Usery, 426 U.S. 833 (1976) | 12 |
| Oregon v. Mitchell, 400 U.S. 112 (1970) | 13 |
| Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) | 6, 11 |
| Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935) | 7 |





| | |
|---|---|
| U.S. v. Grimaud, 220 U.S. 506 (1911) | 7 |
| U.S. v. Midwest Oil Co., 236 U.S. 459 (1915) | 7 |
| **U.S. Constitution** | |
| Art. I, sec. 8, cl. 17 | 7 |
| Art. IV, sec. 3, cl. 2 | 5 |
| Art. VI, cl. 2 | 5 |
| **Statutes** | |
| Act of January 26, 1915, cl. 19, sec. 4, 38 Stat. 800, 16 U.S.C. 195 | 7 |
| Mineral Lands Leasing Act, 1920, 30 U.S.C. 181 et seq. | 2, 11 |
| Nevada A.B. 413 | 9 |
| **Texts and Articles** | |
| Engdahl, State and Federal Power Over Federal Property, 18 Ariz. L. Rev. 283 (1976) | 9 |
| Public Land Law Review Commission Report, ONE THIRD OF THE NATION'S LAND (1970) | 4 |

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## STATEMENT OF INTEREST OF AMICUS

The Western Governors' Policy Office (WESTPO) is an instrumentality of ten States (Alaska, Arizona, Colorado, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming). WESTPO's members are the Governors of those ten states, and the ten member Governors constitute WESTPO's Board of Directors.

WESTPO was organized in non-profit corporate form by the member Governors during the September, 1977 annual meeting of the Western States' Governors in Anchorage, Alaska, for exclusively governmental purposes, to provide an instrument for state policy management and vehicle for collective expression and influence with respect to important regional, interstate, and federal-state issues.

The member State Governors, who constitute WESTPO's Board of Directors, regard the issues involved in this present case as among the most substantial and urgent of current issues affecting their respective States, even though the case arises out of a non-WESTPO State. This is the first judicial matter in which the WESTPO Governors have sought collectively to assert their States' common interest - - a fact which emphasizes the cardinal importance of this case.

The decision below profoundly unsettles long established governmental practices with regard to approximately one-half the total combined land area of the WESTPO States. Federally owned public lands comprise ninety-five percent of the land area of Alaska; sixty-six percent of Utah; forty-eight percent of Wyoming; forty-five percent of Arizona; thirty-six percent of Colorado; thirty-four percent of New Mexico; thirty percent of Montana; and lesser proportions of North Dakota, South Dakota, and Nebraska. A great majority of this vast federal estate is administered by the Bureau of Land Management (BLM) of the Department of the Interior. The decison below places a novel and unprecedented interpretation upon a fifty-nine year old statute administered by BLM, the Mineral Lands Leasing Act of 1920, to hold that traditional and essential state and local powers of government are preempted with regard to private activities on the public lands.

## ARGUMENT

### I

Ventura County had not attempted to influence or affect federal government activities. The appellee in this case is Gulf Oil Corporation,



and the issues presented on the appeal involve only private activities taking place on federal public lands. The decision below radically curtails traditional state power to secure the public interest, just at the time when burgeoning private development of public land resources is giving new urgency to that long established state and local role.

Both the language and the legislative history of the Mineral Lands Leasing Act of 1920 and its subsequent amendments strongly negate any preemptive intent on the part of Congress. In the absence of any express or fairly implied preemptive intent by Congress, the public land States have traditionally exercised their powers as Ventura County sought to do in this case, to preserve the public interest with regard to private users of the public land just as they do with regard to users of private land. This pattern of long established practice, which indeed has constitutional foundations, ought not to be disrupted upon the novel interpretation of a two generation-old statute never given such construction before. At least it ought not to be so disrupted without plenary and careful consideration by this Court.

### II

The decision below is also at odds with the comprehensively considered

policy recommendations of the Public Land Law Review Commission, which was created by Congress in 1964, PL 88-606, 78 Stat 982. The Commission and its broadly representative staff and Advisory Council studied federal public land policy for five years at Congress' direction, before presenting its final report to Congress in 1970. Among the Commission's final policy recommendations was the following:

> "Recommendation No. 13: State and local governments should be given an effective role in Federal agency land use planning. Federal land use plans should be developed in consultation with these governments, circulated to them for comment, and should conform to state and local zoning to the maximum extent feasible. As a general rule, no use of public land should be permitted which is prohibited by state or local zoning."

Public Land Law Review Commission Report, ONE THIRD OF THE NATION'S LAND at 61 (1970).

III.

Appellant's statement of the Questions Presented on this appeal also raises a constitutional issue concerning the relative scope of state and federal legislative jurisdiction over the



federal public lands. It is scarcely possible to overstate the significance of this issue to the public land States in the West.

In 1976, this Court decided Kleppe v. New Mexico, 426 US 529. There were several sound legal rationales available to the Court on which that decision could appropriately have been based. The Court chose to base the decision, however, on a view of the Property Clause (U. S. Const., Art. IV, §3, Cl.2) and the Supremacy Clause (U.S. Const., Art., VI, Cl.2) which had the effect, apparently inadvertent and unperceived by this Court, of revolutionizing a seldom litigated and until now relatively obscure branch of constitutional law.

With all genuine respect, the WESTPO Governors and their States believe the constitutional rationale in Kleppe was profoundly and demonstrably in error. The correction of that error is important to resolution of the present Ventura County case and is of paramount urgency to the WESTPO States.

The Kleppe decision would produce little mischief if it were confined to its facts and to the narrow statement of its holding expressed by this Court, namely, that "the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding," 426 U.S. at 546-547. As the opinion of the Court of Appeals herein illustrates, however, lower courts are giving the Kleppe decision far more

sweeping effect, with consequences for State jurisdiction surely never contemplated by this Court.

Constitutional doctrine concerning legislative jurisdiction over the federal public lands is an exceedingly complicated and easily misunderstood branch of constitutional law. The easy assumption that the Property Clause confers a general legislative power over the public domain, no different for Supremacy Clause purposes from the other enumerated powers, reflects a woeful misapprehension of the precedents and of the fundamental constitutional reasoning on which those precedents are based.

Shortly after the first states containing large tracts of federally owned land were admitted into the Union, this Court reached the conclusion that the Property Clause carries a different meaning for federal lands within the boundaries of States than it does for unincorporated territories. While the facts in Mayor of New Orleans v. United States, 35 U.S. (10Pet.) 662 (1836) and Pollard v. Hagan, 44 U.S. (3How.) 212 (1845) involved only so-called "common" lands (such as river bottoms and tidelands), the rationale of those cases was that to acknowledge a general federal legislative jurisdiction over the lands within States to which the United States retained title would subvert the doctrine of enumerated federal powers. Certainly



Congress as sovereign legislator could exercise on that land all the legislative powers enumerated in Article I and elsewhere in the Constitution, including the Necessary and Proper Clause; but the Property Clause itself was held to confer over this federal property only a Congressionally exercisable administrative power, not the legislative power of a sovereign.

For that reason it was held that the Property Clause power over private uses on federal land could validly be delegated to administrative officials in general and unspecific terms, United States v. Grimaud 220 U.S. 506, 515-516 (1911); United States v. Midwest Oil Co., 236 U.S. 459, 474-475 (1915), even at a time when this Court was enforcing stringent restrictions (long since abandoned) against the delegation of legislative power, e.g. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). For that reason also this Court held that a federal administrator's exercise of the Property Clause authority expressly delegated to him by the Act of January 26, 1915, cl.19, §4, 38 Stat. 800 (codified, as amended, 16 U.S.C. § 195) could not override State law governing private activities in Rocky Mountain National Park at a time when that Park was federal property under the Property Clause but not yet a "federal enclave" under U.S. Const., Art. I, §8, cl. 17. Colorado v. Toll, 268 U.S. 228 (1925).

Congress certainly had extensive legislative powers over the public domain, powers derived from the constitutional grants equally applicable throughout the United States; and those powers were considerable, and were and are ample to effectuate all of the United State's sovereign concerns. The additional power as to federal public lands within States conferred by the Property Clause, however, was well understood to be the administative power of a property owner, not the legislative power of a sovereign; and hence, to that power the Supremacy Clause (which is written in terms of legislative powers) was held not to apply.

There were refinements of these principles, and narrow exceptions which developed for specific historical and policy reasons apparent when the cases are carefully studied; but the general principle remained unchanged in the jurisprudence of this Court until Kleppe v. New Mexico in 1976.

The opinion in Kleppe gives no indication that this Court perceived that it was changing the law. Certainly there was no indication of any policy consideration by this Court, nor any awareness of the profound implications of this change for the public land States, which since the nineteenth century have structured their polity in reliance upon the traditional rules.



At the time of deciding Kleppe, this Court lacked adequate guidance through the difficult and seldom litigated issues in this field. The first comprehensive scholarly study of Property Clause doctrine was not published until after the Kleppe decision, and it promptly became the standard reference in the field. Engdahl, State and Federal Power Over Federal Property, 18 Arizona Law Review 283 (1977), reprinted in 14 Public Land and Resources Law Digest 269 (1977). The article documents in meticulous detail not only the source and evolution of the constitutional rules in this field, but also the sources and subtleties of the con-conceptual errors which appear res-responsible for the ill-conceived constitutional rationale of the Kleppe decision.

Nevada, which is not a WESTPO state, seeing the constitutional basis of its sovereignty over eighty-six percent of its territory exploded by the rationale endorsed by this Court in Kleppe, has launched a widely publicised "Sagebrush Rebellion",[1]

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[1]Among the articles relating the "Sagebrush Rebellion" to the issues in the present case, see: "Sagebrush Rebellion Heads for Courts," Western Law Journal, vol. 1, no. 2, page 1 (Nov./Dec. 1979); "Sagebrush Rebels Eye Ventura County Lawsuit," Los Angeles Daily Journal, October 8, 1979, page

claiming title to much of the public domain in Nevada by an audacious legislative act, A.B. 413, effective July 1, 1979, as a means to restore the traditional legislative power that has been lost. The WESTPO Governors believe, however, that it is not necessary to infringe upon the administrative prerogatives of the federal government as a landowner conferred by the Property Clause as to federal lands within States. They consider it better advised to rely upon the distinctions traditionally drawn in constitutional doctrine between federal administrative powers deriving from ownership (although exercised by Congress in legislative form), and the legislative powers of the United States as a sovereign, conferred by constitutional provisions other than the Property Clause.

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1; see also cover story, "The Angry West," and article, "Sagebrush Revolt," in Newsweek, Sept. 17, 1979, pages 38-39; "Western Officials Devise Strategy to Get U.S. Land," Los Angeles Times, September 7, 1979, page 6; "10 States Endorse Sagebrush Rebellion," Reno Evening Gazette, July 30, 1979, p. 7; "Nevada Trying to Reclaim Land Held by Government Since 1864," New York Times, June 10, 1979, section 1, page 50.



Since it was enacted at a time, in 1920, when the administrative and non-legislative constitutional character of enactments under the Property Clause was well understood, and since it does not purport to rest upon any other constitutional federal power, it would be remarkable if one could discover any evidence of congressional intention to preempt state or local legislative jurisdiction by the enactment of the Mineral Lands Leasing Act. Indeed, several provisions of the Act (e.g., 30 U.S.C. §189) make it quite evident that Congress knew it was exercising only its non-legislative powers as the landowner, and disavowed any attempt to deny or interfere with any legislative power state or local authorities might exercise under their respective constitutional and statutory provisions. Even if one could find - - as the Court below did not - - some fair indication that Congress had intended such arrogation of legislative power, the constitutional rule repeatedly reaffirmed since Pollard v. Hagan, supra, in 1845, and applied forcefully again in Colorado v. Toll, supra, just five years after the Mineral Lands Leasing Act was enacted, would have precluded it. That is the constitutional rule which escaped even the barest recognition of this Court in Kleppe, where the confusion over the precedents was doubtless compounded by the arguments of counsel concerning unfounded notions of "exclusive" power.

Consequently, these governors most earnestly urge this Court to open the constitutional rationale of Kleppe v. New Mexico to a sober and reflective reexamination in light of the vital policy considerations and comprehensive constitutional scholarship that can now be placed before the Court.

> "It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examinaton and the test of experience."

Field, J., for the Court in Barden v. Northern Pacific Railroad Co., 154 U.S. 288, at 322 (1894).

Four terms ago this Court acknowledged its prior overlooking of the traditional rule of intergovernmental immunities, and overruled in National League of Cities v. Usery, 426 U.S. 833 (1976), the error it had made only eight years before in Maryland v. Wirtz, 392 U.S. 183 (1968). A short time earlier, an unfounded "second rationale" for an otherwise well grounded decision, endorsed by all of the Justices in Katzenbach v. Morgan, 384 U.S. 641, at 653-656 (1966), had been celebrated by commentators and utilized as the express and flaunted constitutional basis by congressional sponsors and supporters for enactment of the federal act lowering the voting age even for



state elections; but once the subtle errors of that second rationale were exposed, not one of the Justices endorsed the rationale to which all had subscribed only four years before, see Oregon v. Mitchell, 400 U.S. 112 (1970), and the article there cited at p. 142 n.7.

Fundamental constitutional issues of governmental structure are far too important to be controlled by a rigid stare decisis that makes the most recent error immutable law. "Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law." Rehnquist, J. for the Court in Edelman v. Jordan, 415 U.S. 651, at 671 (1974).

## Conclusion

For the foregoing reasons, the Governors of the ten States of Alaska, Arizona, Colorado, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming, organized as the Western Governors' Policy Office (WESTPO), earnestly urge this Court to take jurisdiction of the appeal in this case, and specifically to reach the constitutional issue of the nature of federal power based only upon the Property Clause of Article IV of the Constitution.

Respectfully submitted,

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